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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. AUSTIN CODY HUGHES, Defendant and Appellant.	C086010 (Super. Ct. No. CRF171905)

Defendant Austin Cody Hughes and his codefendant (Demarco Rowe, not a party to this appeal) physically attacked a man and stole his backpack and cell phone. A jury found defendant guilty of two counts of second degree robbery--one with an enhancement for great bodily injury--and battery with serious bodily injury. The trial court found true the allegation that defendant committed the instant crimes while released on bail with pending charges in two other cases.

On appeal, defendant contends the trial court erred in failing to stay or dismiss the on-bail allegation because defendant was not yet convicted of the charges for which he

was on bail at the time the court adjudicated the instant offense. Defendant also claims his sentence for battery with serious bodily injury must be stayed pursuant to Penal Code section 654.[1]

We agree the trial court erred in failing to stay or dismiss the on-bail enhancement, but we conclude substantial evidence supports the court's failure to stay defendant's battery conviction. Finally, we vacate the sentence of three years imposed for an apparently non-existent enhancement, as we explain *post*. We affirm the judgment as modified and remand for resentencing on the on-bail enhancement.

FACTUAL AND PROCEDURAL BACKGROUND

On April 20, 2017, at approximately 7:00 p.m., victim C.C. was riding his bicycle home from class, carrying a backpack. A car approached him from behind and forced him to stop. He testified that the car's occupants were yelling something at him, but he could not hear them clearly because he was listening to headphones. He got off his bicycle because he thought the occupants might have been yelling that he had dropped something.

Erika Vizcara was driving defendant, Rowe, and Vincente McEvoy when she tried to make a U-turn. She claimed C.C. yelled out "learn how to drive, bitch." Vizcara and C.C. argued. According to McEvoy, "I guess we got close to the bike or someone hit him. I don't know." Defendant testified that C.C. rode his bicycle in front of their car, requiring Vizcara to brake hard; C.C. then yelled an obscenity at Vizcara.

Defendant and Rowe got out of the car and confronted C. C. Vizcara heard defendant telling C.C. not to talk to her that way. Defendant testified that he, Rowe, and McEvoy got out of the car and defendant said to C.C., "Watch who the fuck you're

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[1] Further undesignated statutory references are to the Penal Code.

talking to." Defendant claimed at trial that Rowe ran up to C.C. and punched him twice in the head and once in the ribs before the men left the scene.

C.C. disagreed defendant said anything to him; he asserted defendant and Rowe rushed toward him and punched him in his face, side, and back over 10 times. McEvoy did not recall any conversation between defendant, Rowe, and C. C., he only remembered defendant and Rowe "[b]eat him [C.C.] up, take [*sic*] his stuff." As defendant and Rowe continued to hit C.C., Rowe took C.C.'s backpack and demanded he take off his pants. C. C. did not take off his pants, but he handed one of the men his cell phone. The men swore at him and then returned to the car. As they drove away, C.C. heard Vizcara yell at him, "You deserve it."

A jury found defendant guilty of second degree robbery (§§ 211, 212.5, subd. (c); count 1) with a great bodily injury enhancement (§ 12022.7, subd. (a); count enhancement 1a), battery with serious bodily injury (§ 243, subd. (d); count 2), and second degree robbery (§§ 211/212.5, subd. (c); count 3). In September 2017, at a bifurcated trial, the trial court found true the allegation that defendant committed the offenses while on bail. (§ 12022.1, subd. (b).) The prosecution presented evidence of defendant's two pending cases in Solano County. The first complaint charged defendant with committing first degree residential burglary, a serious felony, in October 2015. Defendant posted bond in September 2016. On April 11, 2017, the trial court continued defendant's case and continued bail. The prosecution did not present evidence that defendant was convicted in that case.

An information filed in the second case charged defendant with committing second degree robbery, a serious felony, in March 2016. Defendant posted bond in August 2016. The trial court held defendant to answer on that charge after a preliminary hearing on April 11, 2017. Defendant was continued on bail on that date. As in the first case, the prosecution did not present evidence defendant was convicted.

The trial court sentenced defendant to nine years in prison: the middle term of three years for count 1, three years for the enhancement to count 1, one-third the middle term--one year--for count 3, and two years for the on-bail enhancement, to be served consecutive.

The trial court also orally imposed a concurrent term of three years for count 2, and an additional three years for "Count 2A," a count not alleged in the information and not decided by the jury. The abstract of judgment reflects a two-year (low term) concurrent sentence for count 2, and it does not reference a "Count 2A."

DISCUSSION

I

On-Bail Enhancement

Defendant contends the two-year sentence for the on-bail enhancement pursuant to section 12022.1 must be stayed. The People properly concede the issue.

Under section 12022.1, "if a person charged with a felony (the primary offense) is released on bail or on his or her own recognizance and subsequently is arrested for committing another felony (the secondary offense) while released from custody on the primary offense, and if that person is convicted of both offenses, he or she 'shall be subject to a penalty enhancement of an additional two years in state prison which shall be served consecutive to any other term imposed by the court.' [Citation.]" (*People v. Walker* (2002) 29 Cal.4th 577, 582, fn. omitted.) While not an element of the enhancement, a felony conviction for the primary offense is an essential prerequisite to its imposition. (*In re Jovan B.* (1993) 6 Cal.4th 801, 814.)

"[W]hen, as here, the secondary felony offense is adjudicated first and an on-bail enhancement is proved, the secondary-offense court may . . . (1) . . . stay 'imposition of the enhancement.' If the court follows that course, the enhancement is not imposed as a part of the defendant's sentence but is preserved until after the primary-offense court has rendered judgment on a felony conviction in that court, at which time the secondary-

offense court . . . may either impose the enhancement or strike it pursuant to section 1385. (2) Alternatively, . . . [i]f the [secondary-offense] court determines to *impose* the enhancement, it may do so, but it also must stay execution of that aspect of the sentence, pending resolution of the prosecution of the primary offense. If the court imposes the enhancement and stays its execution, that aspect of the imposed sentence becomes effective immediately upon the primary-offense court's order lifting the stay after the defendant has been convicted of the primary felony offense." (*People v. Meloney* (2003) 30 Cal.4th 1145, 1149.)

Here, the prosecution alleged defendant committed the current, or secondary offenses while on bail for the earlier, or primary offenses. The trial court found true the on-bail enhancement, but the prosecution did not present evidence that defendant had been convicted of the primary offenses. Therefore, the court was required to stay the two-year enhancement after imposition. But there were other options available as well. On remand, the court may stay imposition of the enhancement, impose the enhancement and stay its execution, or dismiss the enhancement pursuant to section 1385 if the court determines that doing so would be in the interest of justice.

II

Section 654

Defendant next contends his sentence for battery with serious bodily injury must be stayed under section 654 because the battery occurred during a single and continuous course of conduct and shared a criminal purpose with the robbery. He describes the battery here as "the means of committing the robbery." We disagree.

Section 654, subdivision (a) provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

"Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective. [Citations.] We first consider if the different crimes were completed by a 'single physical act.' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single ' "intent and objective" ' or multiple intents and objectives. [Citations.] At step one, courts examine the facts of the case to determine whether multiple convictions are based upon a single physical act. [Citations.] When those facts are undisputed . . . the application of section 654 raises a question of law we review de novo. [Citations.]" (*People v. Corpening* (2016) 2 Cal.5th 307, 311-312.) "Whether a defendant will be found to have committed a single physical act for purposes of section 654 depends on whether some action the defendant is charged with having taken separately completes the actus reus for each of the relevant criminal offenses. [Citations.]" (*Id.* at p. 313.)

If the crimes involved more than one physical act, a defendant may be punished for a divisible course of conduct violating more than one statute in pursuit of multiple criminal objectives. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) " 'It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible.' " (*People v. Hicks* (1993) 6 Cal.4th 784, 789.)

Here, although the trial court made no explicit findings (as it was not asked to apply section 654), "implicit in the trial court's concurrent sentencing order is that defendant entertained separate intentions . . . ." (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1565.) " 'The defendant's intent and objective are factual questions for the trial court.' " (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) Trial courts have broad latitude to determine whether a defendant harbored one or more

objectives, and we uphold their findings on appeal if there is any substantial evidence in the record to support them. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) " 'We review the court's determination of [a defendant's] "separate intents" for sufficient evidence in a light most favorable to the judgment, and presume in support of the court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence. [Citation.]' [Citation.]" (*People v. Andra* (2007) 156 Cal.App.4th 638, 640-641.)

There is substantial evidence supporting the trial court's implied findings that defendant committed two physical acts and harbored multiple criminal intents and objectives during the altercation. The evidence construed in the light most favorable to the court's implied findings showed that defendant and Rowe physically attacked C.C. following a verbal altercation. That physical attack and the resulting injuries constituted the battery with great bodily injury. The next act was robbery; defendants pulled C.C.'s backpack away from his body and demanded his pants, which resulted in his surrender of his cell phone.

Substantial evidence also shows that defendant entertained multiple criminal intents during the altercation. Vizcara and McEvoy testified the incident began with an unfriendly verbal exchange between Vizcara and C.C. Then defendant got involved and battered C.C. in response to that exchange. At some point during the battery, defendants developed the subsequent intent to rob C.C. We disagree with defendant's argument that the evidence shows that physical attack was *merely* a means to accomplish the robbery. There is substantial evidence the battery began as punishment or revenge for C.C.'s perceived conduct toward Vizcara and morphed into a robbery. Because there is substantial evidence supporting the trial court's implied finding that defendant harbored separate criminal intents and objectives during the attack, multiple punishments were permissible.

III

Oral Pronouncement and Abstract of Judgment

A sentencing error that resulted in an unauthorized sentence has come to our attention, although not briefed by the parties.[2]

The trial court orally pronounced a three-year sentence for "Count 2A," a count or count enhancement that was neither charged nor found true. This sentence was unauthorized and we must vacate it. (*People v. Smith* (2001) 24 Cal.4th 849, 854 [an unauthorized sentence may be corrected at any time whether or not there was an objection below].)

Further, although the trial court orally pronounced a concurrent sentence of three years for count 2, the abstract of judgment reflects a two year (stayed) sentence. "Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. [Citations.]" (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) The mistake should not be repeated in the new abstract of judgment after resentencing on the on-bail enhancement.

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[2] In the interests of judicial economy, we have proceeded in the absence of supplemental briefing. Any aggrieved party may invoke the remedy provided by Government Code section 68081.

DISPOSITION

We modify the judgment to vacate the sentence for the nonexistent enhancement "2A" and remand for resentencing on the on-bail enhancement as described on this opinion. The judgment is otherwise affirmed.

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Hull, J.